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No. 08-962

IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and Howard McDougall, Trustee,
Petitioners,

v.

GENERAL MATERIALS, INC., d/b/a WHOLESALE MATERIALS CO., a Michigan Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE RESPONDENT CONCEDES THAT THE COURT OF APPEALS "REFUSED" TO APPLY THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW MANDATED BY THIS COURT'S PRIOR DECISIONS.

The district court indicated that the "parties agree that the arbitrary and capricious standard [of review] applies to the Trustees' decision that General owed contributions from 1993 [to 2005]" under the Participation Agreement drafted by the Trustees. (Pet. App.

17a). Despite the parties' agreement that the arbitrary and capricious standard applies, the Respondent concedes in its brief that the "Court of Appeals . . . refused to consider th[e] argument." (Br. in Opp. 20). The Court of Appeals' refusal to apply the arbitrary and capricious standard directly conflicts with this Court's decisions in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989) and *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 n.8 (1985), which establish that judicial review must be deferential where the trust document gives the Trustees discretion to interpret plan documents like the Participation Agreement drafted by the Trustees. Had the correct standard of review been applied, the Trustees' decision would have been upheld because their minutes indicate that they relied upon decisions from other courts that establish that the duty to contribute continues under the very same Participation Agreement even if the collective bargaining agreement and the bargaining relationship have ended. *Central States Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005); *Central States Pension Fund v. Marine Contracting Co.*, 878 F.Supp. 1176, 1178 (N.D. Ill. 1995); *Central States Pension Fund v. Dussault Moving Co.*, 871 F.Supp. 1046 (N.D. Ill. 1995). Therefore, the Petition should be granted and the case should be remanded for reconsideration under the arbitrary and capricious standard of review.

The Respondent's Brief correctly represents that sixty-six year old James Smith, the retiree who has been catastrophically impacted by the Court of Appeals' decision that has forced the Fund to slash his monthly pension benefit from $2,000 to $486.50 and who now faces liability to the Petitioners for a $250,000 overpayment, "has retained separate legal

counsel and an administrative appeal of Petitioners' decision has been filed." (Br. in Opp. 5). Smith's appeal to the Trustees was not received by the Petitioners until two days after the Petition was filed. In the event Smith's appeal is denied by the Trustees and Smith files suit, the court will certainly apply the arbitrary and capricious standard of review to the Trustees' decision under *Firestone Tire and Rubber Co.* and *Central Transport, Inc.* Application of a standard of review in a suit concerning the meaning of a document created by an ERISA fund (like the Petitioners' Participation Agreement) that is more deferential when the suit is filed by a participant against the fund than when the suit is filed by a fund against an employer, is illogical and creates risk of inconsistent results.

The Respondent's assertion that its appeal to the Trustees for a contribution refund "never submitted to the Trustees the issue of whether any contributions were owed after December 31, 1993," is plainly erroneous. (Br. in Opp. 19). Respondent fails to mention that it never made this argument in its Court of Appeal's brief and it overlooks the district court's determination that "[t]he parties agree that the arbitrary and capricious standard applies to the Trustees' decision that General owed contributions from 1993 [to 2005] as well as the Trustees' denial of General's request for a refund." (Pet. App. 17a). Moreover, ERISA prohibits a contribution refund unless the post-1993 contributions were paid by mistake of law or fact. 29 U.S.C. § 1103(c)(A)(ii). To satisfy the statutory "mistake" requirement, the Respondent had to try to convince the Trustees that the post-1993 contributions were not owed and as a result, the Respondent devoted two pages of its appeal to the issue of whether it was obligated to

contribute under the Participation Agreement. Thus, the Respondent's appeal necessarily asked the Trustees to decide whether the Participation Agreement obligated the Respondent to contribute after 1993. Having submitted the issue to the Trustees, the Respondent was not entitled to the *de novo* review of the issue it received from the Court of Appeals.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE SEVENTH CIRCUIT'S *SCHILLI CORP.* DECISION.

The Respondent asserts that *Central States Pension Fund v. Schilli* Corp., 420 F.3d 663 (7th Cir. 2005) is distinguishable because it was a withdrawal liability case and the issue was the date the employer withdrew from the Fund, not whether the employer owed additional contributions to the Fund. However, the issue in *Schilli Corp.* and this case is identical because ERISA defines the date of a withdrawal as the date the employer "permanently ceases to have an obligation to contribute under . . . [its] collective bargaining agreement." 29 U.S.C. § 1385(b)(2)(A)(i). As a result, the Seventh Circuit indicated that in order to prevail, the Fund "must show that Truck Transport . . . ceased to have an obligation to contribute to the fund" when the bargaining relationship and collective bargaining agreement ended by virtue of the decertification. 420 F.3d at 668. The Seventh Circuit held that resolution of this controlling issue turned on the meaning of the very same duration clause of the Participation Agreement.

Ultimately, the Seventh Circuit held that the Participation Agreement obligated an employer to continue to contribute after the collective bargaining

agreement terminated and the bargaining relationship had been severed, solely because the employer had not provided the written notice of termination to the Fund that is required by the Participation Agreement. On the other hand, the Sixth Circuit held that the same duration clause was surplusage and the Participation Agreement terminated without the required written notice because the collective bargaining agreement and bargaining relationship had terminated. The clear conflict between this case and *Schilli Corp.* should be resolved by this Court to insure that there are no more employees like James Smith facing drastic benefit reductions and enormous overpayment claims.

III. GENERAL'S STATUTE OF LIMITATIONS DEFENSE IS WITHOUT MERIT.

General erroneously asserts that this case is a poor vehicle for resolving the conflict with this Court's decisions as well as the Seventh Circuit's *Schilli Corp.* decision because the Petitioners cannot prevail since the district court alternatively held that the Petitioners' claim is barred by the Michigan 6-year written contract statute of limitations. The district court's ruling that the Petitioners' claim is barred by the statute of limitations cannot possibly apply to the contributions that became due within six years of the filing of this suit in March 2004. *Trustees for Alaska Laborers Health Fund v. Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987) (A fund's claim for each monthly contribution payment accrues as each payment is missed.) Indeed, General conceded that the statute of limitations was only a partial defense in a district court brief, which indicated that "any claim that accrued after March 1, 1998 would arguably still be actionable [but] Central States has refused to limit

its claim to that time period." Thus, at least a portion of the Petitioners' claim will certainly survive the statute of limitations defense.

Further, the selection of the Michigan 6-year contract limitations period was erroneous because the trust agreement indicates that "[i]n all actions taken by the Trustees . . . to collect delinquent contributions from employers . . . the ten-year statute of limitations applicable to actions on written contracts in the State of Illinois shall apply." This Court and the Courts of Appeal have held that contractual provisions establishing a limitations period like the trust agreement provision are enforceable. *Missouri, Kansas & Texas Railway Co. v. Harriman*, 227 U.S. 657 (1913); *Morrison v. Marsh & McLennan Co.*, 439 F.3d 295, 301-02 (6th Cir. 2006); *Northern Regional Med. Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1303 (11th Cir. 1998); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 875 (7th Cir. 1997). In its district court brief, the Respondent asserted that no part of the Petitioners' claim accrued before March 1995. Since suit was filed in March 2004, no part of the Petitioners' claim would be barred by the ten-year statute of limitations.

Moreover, the district court never decided the Petitioners' Fed.R.Civ.P.Rule 37 Motion to Strike, which showed that none of the facts relied upon by the district court in support of its ruling had been disclosed in response to an interrogatory that required the Respondent to identify all facts upon which the limitations defense was based. The Motion to Strike also provided evidence that contradicted each and every fact relied upon by the district court, but these facts were ignored because the district

court overlooked the Motion to Strike. Consideration of these overlooked facts will establish that there is no basis for the assertion that the Petitioners had the requisite knowledge of their claim for the statute of limitations to begin to accrue prior to the Petitioners' audit in 2004.

CONCLUSION

For the foregoing reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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